BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAT G. POPPLEWELL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,037,291
PENSKE TRUCK LEASING COMPANY	)	
Respondent	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the January 7, 2008 preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh. Claimant was awarded medical benefits after the Administrative Law Judge (ALJ) determined that claimant's injury arose out of and in the course of claimant's employment. Respondent was ordered to designate an authorized treating physician for evaluation and treatment. Claimant was also awarded temporary total disability benefits from October 24, 2007, until claimant is released to return to work without restrictions, is released to return to work with restrictions that will permit substantial gainful employment, or reaches maximum medical improvement.

Claimant appeared by his attorney, Keith L. Mark of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Thomas G. Munsell of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the Administrative Law Judge (ALJ), and has considered the same record as did the ALJ, consisting of the transcript of the deposition of Pat Galen Popplewell taken December 5, 2007; the transcript of the Preliminary Hearing held January 7, 2008; and the documents filed of record in this matter.

ISSUES

Did claimant meet with personal injury by accident arising out of and in the course of his employment with respondent? Respondent, relying on *Johnson*,[1] argues that claimant's injuries, which occurred while claimant was descending stairs, were the result of the normal activities of day-to-day living and thus not compensable.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

This matter came before the ALJ at a preliminary hearing on January 7, 2008, with claimant requesting medical treatment and temporary total disability benefits for his alleged injuries of October 23, 2007.

Claimant, who worked for respondent as a city truck driver, began working for respondent in July 2001. On October 23, 2007, claimant sustained an accident while he was performing his job duties. Claimant was at a warehouse and was on his way to his company truck. He had paperwork in his hand related to the next delivery he was going to make. He was not rushing or in any particular hurry. It was just a normal delivery. As claimant was going down some steps, he tripped or stumbled or missed a step and fell on concrete, striking his left elbow, his right hand and both knees. Claimant does not know whether he tripped or whether there was something on the step, such as a pebble or debris, that caused him to fall. He cannot say that there was any debris on the steps. Claimant was coming down the steps, and he thought the next step was flat ground, but apparently it was not and he fell. He missed the last one or two steps.

Claimant testified that before he fell, there was a concrete truck across the street which distracted his attention. The truck was backing in, and claimant was trying to figure out what it was doing there. That truck was out of the ordinary. The steps he fell down were an entryway onto the loading dock. Claimant believes that something caused him to trip, but he does not know exactly what it was.

Claimant stated several times during his deposition testimony that he does not know what he tripped over. He testified that there is always trash around that area and there are always rocks and pebbles. After the accident happened, claimant was more concerned about his injuries and getting the load delivered, and he did not check the step to see if there was anything there.

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[1] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P. 3d 1091, *rev. denied* 281 Kan. ___ (2006).

After claimant hit the ground, he began having pain in his right thumb. That was the main thing that hurt. He also had pain in his left elbow, left knee and right ankle and numbness in his left ankle. He had a bruise on his right knee and contusions on his left knee. He also had problems with his lower back and right rib area. The injuries to his right hand and right knee required medical treatment. Claimant has been unable to work on account of the injuries.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

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[2] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2006 Supp. 44-501(a).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 2006 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[6]

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[7]
>
> An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[8]
>
> An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[9]

There is no dispute that claimant's injuries occurred while he was in the course of his employment. Claimant was at a warehouse performing the duties of his job and carrying paperwork related to his next delivery. The significant dispute centers around whether claimant's accident occurred out of claimant's employment with respondent or whether it was the result of normal activities of day-to-day living, or was the result of an idiopathic fall.

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[6] K.S.A. 2006 Supp. 44-508(d).

[7] K.S.A. 2006 Supp. 44-508(e).

[8] *Johnson*, *supra*, at Syl. ¶ 1.

[9] *Id.* at Syl. ¶ 2.

To arise "out of" employment requires some causal connection between the accident and the employment.[10] Whether an injury arises out of the worker's employment depends on the facts peculiar to the particular case.[11]

It has been held in Kansas where the effects of a fall are the result of a personal condition, but the conditions of employment place the employee in a position increasing the effects of an injury, the injury becomes compensable.[12] However, where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted.[13]

In this case, we are not dealing with a personal condition. We are dealing with a fall down steps which claimant was using in the course of his job.

In *Hensley*, the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character.[14] This analysis is similar to the analysis set forth in 1 *Larson's Workers Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

Respondent argues claimant's fall resulted from the simple act of walking down the steps. This is not entirely true. Claimant was walking with job-related papers in his hand and was slightly distracted by a cement truck at the warehouse location. This distraction led to claimant simply misjudging the steps, leading to the fall. In this instance, claimant's fall is either related to the conditions of work, or is unexplained, either of which would make it compensable. Therefore, the ALJ's award of benefits should be affirmed.

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[10] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[11] *Id*. at 502.

[12] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992), citing 1 *Larson's Workers' Compensation Law*, § 12.11 (1990).

[13] *Id*. at 460.

[14] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant's fall arose out of and in the course of his employment with respondent. The determination by the ALJ to allow benefits should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated January 7, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2008.

HONORABLE GARY M. KORTE

c: Keith L. Mark, Attorney for Claimant
Thomas G. Munsell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[15] K.S.A. 44-534a.